".... I also take the view that notice to the agent whose duty was to obtain a signed proposal form and send it to the company, was not notice to the company of anything inconsistent with the signed proposal form, and that in filling up the form, whether he mistook the instructions of the insured, or whether he intentionally filled in something different from what he was told, he was not acting as the agent of the company, but as the agent of the insured."

The legal position in such cases is set out in *Halsbury's* Laws of England Vol. 22 (3rd Edition) at page 204:

"In filling in the answers in a proposal form an insurance agent, ..., is normally regarded as the agent for the proposer, at the request, express or implied, of the latter. Even if the agent knows the truth, his knowledge is not in that case imputed to the insurers. If he is careless in filling up the form, it is the proposer, not the insurers, who may maintain an action in negligence against him. Furthermore, where the proposer himself signs the proposal form, as is usually insisted upon by insurers, by signing he adopts whatever answers the agent has inserted and makes them his own. This is clearly the case where he reads and approves the answers before signing: but the position is the same if he chooses to sign the proposal without reading them, or if he signs the form when it is blank, leaving it to the agent to insert the answers later. It is irrelevant to inquire how the inaccuracy arose; or whether the agent acted honestly or dishonestly; or whether the agent had forgotten or misunderstood the correct information he had been given; or whether the answers were a mere invention on the part of the agent; if the result is that inaccurate or inadequate information is given on material matters, or that a contractual stipulation as to accuracy or adequacy of any information given is broken, it is the proposer who has to suffer."

It has been held in a very recent Court of Appeal case in *O'Connor* v. *B.D.B. Kirby Co.*[10] by Megaw L.J. that a broker who takes it on himself to fill in a proposal form for a client owes the client a duty to use such care as is reasonable in all the circumstances towards ensuring that the answers recorded to the questions in the proposal form accurately represented the answers given to the broker by the client. He does not owe a duty to ensure that every answer is correct.

In my judgment for the reasons which I have given the plaintiff's claim is dismissed with cost.

Judgment for defendant.

HARBANS KAUR & ANOR. v. LO KUM SANG

[O.C.J. (Wan Suleiman J.) March 10, 1972]

[Seremban — Civil Suit No. 180 of 1970]

Damages — Award — Road accident — Contributory negligence — Appropriate multiplier — Civil Law Ordinance, 1956, ss. 7 & 8.

The plaintiffs, the administratrix and co-administrator of the estate of one Sarja Singh, deceased, brought this action for the benefit of the estate of the deceased and his dependants, under sections 7 and 8 of the Civil Law Ordinance, 1956.

The deceased was involved in a road accident on February 25, 1969, whereby he was knocked down by a lorry driven by the defendant. The deceased was 54 years old at the time of his death and was due to retire on attaining the age of 60 years. He was employed by the British Army at a salary of $378 per month.

The court had to determine the question of negligence, and whether or not there was contributory negligence on the part of the deceased.

Held: (1) the deceased was contributorily negligent to the extent of 25%;

(2) in the circumstances of this case, any multiplier in excess of 6 would not be appropriate in computing damages;

(3) by virtue of section 8 of the Civil Law Ordinance, 1956, the sum of $2,000 should be awarded to the estate of the deceased. But this sum would merge with the award under section 7. Under section 7 the sum of $17,280 should be awarded to the dependants as general damages. Special damages was agreed at $1,100;

(4) since the deceased was contributorily negligent to the extent of 25%, both general and special damages were to be scaled down to $13,785. Interest disallowed.

Case referred to:-

(1) *Ban Pet Hock* v. *Ong Ah Ho* [1966] 2 M.L.J. 253.

CIVIL SUIT.

David Tay for the plaintiffs.

Wong Seng Chow for the defendant.

Wan Suleiman J.: The plaintiffs who are the administratrix and co-administrator of the estate of Sarja Singh s/o Pakhar Singh, deceased, brought this action for the benefit of the estate of the deceased and his dependants under sections 7 and 8 of the Civil Law Ordinance, 1956.

The statement of agreed facts (Exhibit "A") reads as follows: —

"1. A collision between motor lorry NC 5460 and the deceased occurred on the 25th day of February, 1969 at about 7.20 a.m. at or in front of the General Hospital, Seremban, in the State of Negri Sembilan.

2. At the time of the collision the weather was good, the road was dry and visibility was excellent.

3. The motor lorry NC 5460 which was being driven by the defendant was travelling in the direction of Seremban Town from the direction of Port Dickson."

Harbans Kaur, wife of the deceased, testified that just before the accident they had alighted from a bus at the bus stop in front of the hospital on the left side of the road as one faces Port Dickson, and that she, the deceased and Sarup Singh (PW2) had then proceeded to cross the road to the centre white line, where there was, it is agreed by both sides two raised cement road dividers with a gap in between directly opposite the entrance to the hospital.

Sarup Singh was to her right, and beyond him was the deceased.

She then saw a motor lorry approach from the direction of Port Dickson. When it passed near the place where the deceased was, some 16 feet away from her, she heard a sound, "dum". She did not see the lorry hit the deceased, because she was then looking in the opposite direction. When she examined the deceased who was lying on the road soon after, she found that he had been injured on the head.

The deceased had been standing still when she had last seen him before he was struck. The lorry had passed 9" to 10" away from her.

She had first seen the lorry when it was coming up the sloping road about 10 yards away, moving towards her. There was also a bus at the bus stop across the road, and another behind it.

After the accident the lorry stopped some distance away, a Chinese and a Sikh man came out, looked at the deceased and both then went away in the lorry.

Sarup Singh had very much the same account to give of the incident. He had stopped at one of the concrete road dividers and was between Harbans Kaur and the deceased. Since there was traffic moving along the road the deceased had asked him to tell Harbans Kaur not to hurry. The lorry had knocked into the deceased who, it should be noted, was observed by this witness to be stooping slightly and pointing towards his wife, whilst he was speaking to the witness. He had also heard the sound of the impact between the lorry and the deceased but had not seen the actual collision. In view of the agreed facts, however, the fact that both had not seen the actual collision is of no importance. Sarup Singh had then turned towards the deceased who jumped (perhaps it would be more accurate to say that he was flung backwards) before falling down. He differed somewhat in his assessment of the distance separating himself from the deceased and Harbans Kaur, placing both quite close to him — the deceased about 1 foot away and Harbans Kaur some 2 feet on the other side, at the moment of the impact.

Like Harbans Kaur he too said that the lorry passed very close — hardly a foot in front of him, and he too had noted the two stationary buses on the hospital side *i.e.* the side all three were facing — of the road. He was able to provide the further detail that whilst the lorry passed him, the two buses had remained stationary. This item of evidence is significant when one considers the defence version, and has a direct bearing on the issue of negligence.

Cross-examination elicited the further information that as he crossed the road from the bus stop to the central divider, he had observed the lorry in the distance, coming from his left, and that when he got to the divider it was still about 75 feet away. It is therefore evident that insofar as Harbans Kaur and this witness are concerned, neither had observed the lorry stop at any time, another significant point to be remembered when considering evidence for the defendant.

Much ado was made as to the reason which led to the deceased proceeding to hospital that morning, and evidence was led as regards his recent visit to the Tanjong Rambutan Mental Hospital. However, since there was not the faintest suggestion that his alleged mental condition had in any way contributed to the accident, I propose to ignore this bit of evidence.

There can be no doubt, on perusing the medical report "A" page 6 that some part of the lorry had come into contact with the deceased's head, causing the crush injury thereto which was the cause of death.

The only issue which therefore remains is that of negligence.

The defendant, driver of the lorry NA 5460 said that he had come from Port Dickson and was approaching Seremban at about 7.15 a.m. that morning. On approaching the General Hospital, he was travelling at a speed of about 10 miles per hour whilst ascending the rise at that point.

At the top of the rise he had seen two stationary buses, one at the bus stop (see plan "A" page 3) and the other behind it. When he approached the second bus he stopped for a while, and began to move again when the first bus moved away from the bus stop, and the other bus moved in to take its place.

According to the defendant whilst his lorry was stationary a bus then arrived from Seremban and a number of passengers including some Sikhs alighted, and the Sikhs moved across the road to its centre, which was therefore on his off side.

The defendant then proceeded towards Seremban. In examination-in-chief he said that the off-side of his lorry was 3 feet to 4 feet from the concrete road divider. When he had passed he heard a shout, and saw a crowd. He stopped his lorry and went towards the crowd who surrounded a person lying on the road. He then returned to his lorry and drove away. His police report "A" page 2 was, it should be noted, made after he had been stopped by the police on his return to Port Dickson, at 12.50 p.m. the same day.

It is common ground that the three Sikhs were standing in line at the central divider, the two men on the right of the woman. The defendant however said that the deceased stood next to the woman and that all three were about 2 feet to his off-side, which led him to believe that he could pass them safely.

Under cross-examination the defendant explained why he had to go so close to the road divider even though his half of the road was about 32 feet wide (see "A" page 4: PQ-JK/2), whilst his lorry was only 8 feet wide. He explained that he had stopped just before that because the second bus had stopped in the middle of his half of the road, and he had to swing to the right in order to pass it, even after it had started to move because it was then still occupying the centre of their half of the road.

Seated beside the defendant that morning was Goh Geok Chin, and to his left Bachan Singh.

Goh's testimony echoes that of the defendant. Though he claimed under cross-examination that there was ample space between the buses and the central road divider for the lorry to pass, he was not asked to amplify this statement so that one is left guessing as to what he meant by ample space.

Bachan Singh repeated in somewhat greater detail than had God the testimony of the defendant.

I am inclined to believe Harbans Kaur and Sarup Singh when they claimed that the lorry driver had not stopped at any time before the accident. Even if it had, swerving sharply to the right when he was aware that there were persons standing at the road divider, and when he could very well have waited for the second bus to move further to his left, in the circumstances thereby endangering the persons visible to him, near the road divider, must amount to negligence on the part of the defendant.

The fact that the lorry had hit the deceased makes it highly probable that it had passed between 9" and 1 foot from the two and not 2 feet to 3 feet away from them as the defendant asserted. However, since the lorry did not strike either Harbans Kaur or Sarup Singh who were standing in line with the deceased, the latter's slight stoop just before the accident obviously contributed towards it, so that whilst the major part of the blame must fall on the defendant, it would perhaps be fair to assess contributory negligence on the part of the deceased at 25%.

The deceased was 54 years at the time of his death and was due to retire on attaining the age of 60 years. He was employed by the British Army at a salary of $378 per month and according to Exhibit P1 he was not due for any promotion. Presumably because of withdrawal of part of the British Army from this country, his services would in any case have been terminated in May, 1970.

He was not entitled to any pension, but would have received a gratuity of one month's pay for each year of work, gratuity which, according to paragraph 4 of Exhibit P1 would have been paid out to the plaintiffs, so that there was no loss under this heading. His wife mentioned two other sources of income, travelling allowance and allowance for night patrol. Neither she nor any other witness was able to say the amount of such allowances he received each month.

For three years prior to his death he had lived in Malacca whilst his wife and family lived in Kuala Lumpur. Though he stayed in the Sikh temple whilst in Malacca, he had to pay some unknown amount to the temple authorities. Harbans Kaur claimed that he gave her $350 per month. There is no evidence that the deceased and his family had stayed in the same town at any time apart from some two months before his death when it would appear that he commenced to work in Seremban, where his family joined him. I would therefore say that the maintenance of two separate establishments would mean that the deceased needed more share of his earnings than would otherwise be the case, so that the sum he could afford to give to his wife would probably be in the region of $240.

In deciding upon a suitable multiplier I have to take into account a number of factors peculiar to this case. The deceased's best hope of finding re-employment, if he had not died, on his services being terminated in May, 1970 when he would have been 55 years old, would be as a security officer of some sort. No doubt, as Mr. Jagir Singh had claimed, there may be posts open to him on tin mines, though I doubt whether, should he obtain such employment, he would be paid anything more than what he was receiving at the time of his death. It is common knowledge that there is keen competition for such posts as are available among retired officers of the Malaysian police and in addition a non-citizen like the deceased may find it difficult to obtain the requisite permit under the Employment (Restriction) Act, 1968.

Moreover, the state of his mental health, which had caused him to be sent to Tanjong Rambutan Mental Hospital where he remained for about one week would be yet another factor, albeit a minor one to take into account.

Mr. David Tay on behalf of the plaintiffs has drawn my attention to a number of awards mentioned in the Tables of Awards on pages 35 to 41 of *Kemp & Kemp* on The Quantum of Damages, second edition, volume 2, where somewhat larger multipliers were adopted, but taking the various factors into account I do not think that any multiplier in excess of 6 would be appropriate in the present instance.

I would accordingly award under section 8 of the Civil Law Ordinance, 1956 a sum of $2,000 on behalf of the estate of the deceased. This sum will of course merge into the award under section 7 below.

Under section 7 on behalf of the dependants of the deceased I would award general damages amounting to $240 x 12 x 6 = $17,280. Special damages has been agreed at $1,100.

Since it is my finding that the deceased had by his own negligence contributed towards his own injury and death, this contributory negligence I have assessed at 25%, the award of damages, both general and special, would be scaled down accordingly, and would amount to $\frac{\$18,380 \times 75}{100} = \$13,785$.

On the question of interest on the sum awarded, I am in full accord with the decision in *Ban Pet Hock* v. *Ong Ah Ho*[1] wherein the learned judge cited page 275 of *Mayne and McGregor* on Damages, 12th edition, which reads as follows:—

> "Torts affecting the person are in the nature of things not likely to require the award of interest in the damages. The rationale behind the awarding of interest as damages is that the plaintiff has not been given in contract, and has been deprived of in tort, a capital asset upon which he could earn interest. Thus the question of awarding interest can never arise where the damages awarded are for a non-pecuniary loss, and torts affecting the person form the home ground of recovery for non-pecuniary loss, whether pain and suffering, injury to feelings, injury to reputation. For all such damage no interest will be awarded. As to pecuniary loss, in so far as it constitutes prospective loss, which will generally form the main pecuniary loss, there should again be no award of interest on the damages, since the plaintiff could not have earned interest upon money or other remuneration which *ex hypothesi* he would not yet have acquired at the time of the action. The principal example of such a loss is the loss of impairment of earning capacity in cases of personal injury. A person's earning power can no doubt be regarded as a capital asset, but it is a capital asset relating, as it were, only to the future."

I do not consider that this is an instance in which I should exercise my discretion under section 11 of the

Civil Law Ordinance, 1956. Accordingly there shall be no award of interest.

I award costs to the plaintiffs.

Order accordingly.

Solicitors: *Murphy & Dunbar; Shearn Delamore & Co.*

SINGER SEWING MACHINE CO. v. JEREMIAH

[F.C. (Ong C.J. (Malaya), Gill & Ong Hock Sim F.JJ.)

August 7, 1972]

[Kuala Lumpur — Federal Court Civil Appeal No. 34 of 1972]

Practice and Procedure — Appeal — Application for extension of time to file record of appeal — Notice concerning appeal record having gone astray — Disregard of a mandatory rule — Manifest injustice to aggrieved litigant — — Duty of court — Subordinate Courts Rules, 1950, O. 39 r. 3(2), O. 36 rr. 7 and 19, Form 40.

This was an appeal from the decision of the High Court, Seremban ([1972] 2 M.L.J. 56) which had refused to exercise its discretion in favour of the appellants/applicants to allow an extension of time to file their memorandum of appeal. In disallowing the application, the judge criticized the conduct of the appellant company and their solicitors.

Held, allowing the appeal: in the court below, the judge's strictures on the appellants and their solicitors were unwarranted. To deny them, *in limine*, the right to appeal against the decision of the magistrate on the merits, when the notice in Form 40 had gone astray, and in disregard of a mandatory rule, is to do a manifest injustice to an aggrieved litigant. The respondent should not have opposed the application.

FEDERAL COURT.

K. L. Rekhraj for the appellants.

Leong Tuck Onn for the respondent.

Ong C.J. (Malaya): On January 9, 1971 judgment was given against these appellants by the magistrate at Kuala Pilah in Civil Action No. 65 of 1969. They filed notice of appeal through their solicitors on January 11, 1971. Order 39 rule 3(2) of the Subordinate Courts Rules provides that "as soon as the appeal record is ready the court appealed from shall serve the appellant with a notice in Form 40"; sub-rule (5) then requires the appellant, within 14 days of such notification, unless the court for sufficient cause otherwise orders, to deposit in such court a sufficient sum to cover the cost of preparing the appeal record and also lodge in court $150 as security for costs.

On February 17, 1972 — which I consider an inexcusably long time to prepare the appeal record — the notice in Form 40 was issued. Under Order 8 rule 1, where a party is represented by a solicitor on the record, "the address of such solicitor *shall* be the address for service". This rule is clearly mandatory, but heedless thereof, the process server of the court took the liberty of serving the notice on the appellants at their Petaling Jaya office, where it lay unnoticed by whomsoever it was handed to. On February 25, 1972 the appellants' solicitors were informed over the telephone by the Kuala Pilah court that time was running out. They forthwith remitted the sum of $271 as required, with a covering letter applying for such extension of time as may be necessary to comply with the rules of court. They were, however, directed to make the application to the High Court at Seremban, in the belief that the magistrate's court had no power to grant such extension. This was wrong. In the Subordinate Courts Rules "court" is defined as meaning "a Sessions Court or a Magistrates' Court and the President of a Sessions Court or a Magistrate, as the case may be..." and Order 36 rule 7 clearly states that "the court may extend or abridge the time limited for doing any act, upon such terms as may be just, notwithstanding that the time originally limited has expired". Rule 19 goes on to provide: "Nothing in these Orders and Rules shall be deemed to limit or affect the inherent power of the court to make such orders as may be necessary to prevent injustice or to prevent abuse of the process of the court" The magistrate at Kuala Pilah, therefore, should have allowed the application without further ado

The appellants, being so directed by the magistrate, filed notice of motion in the High Court on March 11, 1972. The application was opposed by the respondent and it was dismissed with costs. I do not think it necessary to go over the grounds given by the judge. Suffice it to say that, in my opinion, his *strictures on the appellants and their solicitors were unwarranted.* To deny them *in limine* the right to appeal against the decision of the magistrate on the merits, when the notice in Form 40 had gone astray — and in disregard of a mandatory rule — is to do a manifest injustice to an aggrieved litigant.

The respondent should not have opposed the application. It is therefore only just that this appeal be allowed with costs to the appellants in any event. The appellants will have 14 days from the date hereof for filing the appeal record.

Gill and **Ong Hock Sim F.JJ.** concurred.

Order accordingly.

Solicitors: *K. L. Rekhraj & Co.; Kam Woon Wah & Co.*